

REMARKS

Status of Claims

Claims 1, 85, 88, 91-106, 118-120, and 130-164 were pending prior to entry of this paper.

Claims 130-136 and 143 are withdrawn from consideration.

Claims 85, 96, 137, 142, and 159 are cancelled herein without prejudice or disclaimer of Applicants' right to pursue the canceled subject matter in one or more related applications.

Support for Amendments

Claims 1, 88, 91, 93-95, 97-98, 101-106, 138-141, 143-145, 148-149, 153, 157-158, and 160-164 are amended herein. Support for the amendments can be found throughout the specification as filed. For example, support for claim 1 can be found on page 3, line 24, and page 12, lines 1-6. Support for claim 91 can be found on page 1, line 34-35 and page 12, lines 1-6. Support for claims 93, 94, 95, and 97, can be found at page 2, lines 2-5, and page 10, lines 4-13, 15-30, and 35-41. Support for claim 141 can be found on page 10, lines 15-30. Claim 144 is supported by original Example 8.

Claims 88, 98, 101-106, 138-140, 145, 148, 149, 153, 157, 158, and 160-164 are amended to correct dependencies, typographical errors, or the like.

No new matter is introduced by the amendments.

Interview Summary

Applicants thank the Examiner for the courtesy of an in-person interview on January 28, 2009, as indicated in the Interview Summary of record. The Interview Summary was discussed at the time of the Interview and agreed upon at that time. Briefly, the deficiencies of Hahn were discussed, and in particular, the fact that Hahn discloses neither (i) a gelatine-based sponge, nor (ii) using a swab (e.g., a gelatine-based sponge) to collect a target from a surface and to recover the target by transferring it to a transfer medium. It was discussed that Applicants would amend the independent product claim (claims 1 and 91) to specify that the product comprises a "gelatine-based sponge" having a stick attached thereto. It was also discussed that the method claims would be amended where necessary to include the step of transferring the collected target

to a transfer medium. Applicant's additional comments regarding the Interview are incorporated in the remarks that follow.

Supplemental Information Disclosure Statement

A supplemental Information Disclosure Statement (IDS) is submitted herewith. Applicants respectfully request consideration of the IDS, as indicated by entry of an initialed copy of the listing of cited references.

Election/Restriction

In the Office Action dated August 7, 2008, the Examiner withdrew claims 91-106, 118-120, and 137-164 as independent or distinct from the invention originally claimed. In the Interview dated January 28, 2009, the Examiner agreed that the restriction by original presentation of August 7, 2008 was improper and that claims 91-106, 118-120, and 137-164 would be examined in the next Office Action. Accordingly, Applicants have not used the status identifier "withdrawn" for these claims in the Listing of Claims found herein.

On the other hand, Applicants understand that claims 130-136 remain withdrawn pursuant to the Examiner's withdrawal of these claims in the Office Action dated October 30, 2007. Upon review of the pending claims, Applicants believe claim 143 would be within the Examiner's categorization of the subject matter of claims 130-136, and therefore Applicants have used the status identifier "withdrawn" for claim 143 in the Listing of Claims found herein.

Claim Rejections

Claim 1 stands rejected under 35 U.S.C. §102(b) as allegedly anticipated by U.S. Patent No. 5,804,203 to Hahn et al. ("Hahn"). Claims 85 and 88 stand rejected under 35 U.S.C. §103 as obvious over Hahn. Applicants traverse these rejections. As the Examiner has agreed that claims 91-106, 118-120, and 137-164 would be examined in the next Office Action, the patentability of all independent claims over Hahn is addressed below.

Product claims 1 and 91 as amended herein require a "gelatine-based sponge" and a handle attached to said sponge. As acknowledged by the Examiner during the Interview of January 28, 2009, Hahn does not teach or remotely suggest such device. While Hahn may

contain unrelated teachings of (i) the addition of gelatine to a strontium formulation [col. 17, lines 14-15], and (ii) a sponge applicator [col. 22, line 47], there is no teaching that the sponge applicator comprises gelatine, let alone that it is gelatine-based. For at least this reason, it is respectfully submitted that product claims 1 and 91 are patentable over Hahn.

With respect to the method claims, the Examiner contends that Hahn's disclosure of using a swab or sponge applicator to apply Hahn's topical strontium formulation to the face would "nearly always" transfer cells to the applicator as a result of the swiping motion of an applicator on the face. As an initial matter, Applicants note that the transfer of cells "nearly always" would be insufficient to establish the inherency of the claimed method in Hahn's disclosure. See MPEP § 2112 ("The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic."); In re Robertson, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) ("Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient."). Rather, it must be shown that the practice of the prior art necessarily practices the claimed method. See MPEP § 2112; Ex parte Levy, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) ("In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art.").

In any event, claims 93, 95, and 97 require the step of transferring the target from the swab or sponge to a transfer medium. There is no disclosure in Hahn of recovering any cells that may have inadvertently transferred to his applicator in a separate transfer medium, and no recognition or suggestion that it would be desirable to do so. Moreover, independent method claim 144 recites the step of "determining the amount of target recovered." Inasmuch as Hahn does not recognize that any target is collected on an applicator, a fortiori, Hahn does not suggest determining the amount of any target recovered. For at least these reasons, independent method claims 93, 95, 97, and 144 are not obvious in view of Hahn.

Having distinguished the independent claims, the dependent claims are believed to be patentable for at least the same reasons. However, Applicants reserve the right to separately address the patentability of those claims in the future, should that become necessary.

Additional Comments

As discussed in the Interview dated January 28, 2008, Applicants traverse the findings of fact in the Office Action lacking documentary evidence to support such findings. According to MPEP § 2144.03 (C), if Applicants challenge a factual assertion as not properly officially noticed or not properly based upon common knowledge, the Examiner must support the finding with adequate evidence.

Previously, Applicants requested documentary evidence that “collagen is protein-based and thus is of natural origin” (p. 4), that ethanol is “an organic buffer” (p. 4), that “microfibrillar collagen is a form of collagen that is also suitable for any application that a collagen is suitable for” (p. 6, OA of 10/30/07), and that a blood cell “contains all of the items set forth in claim 120 i.e. leukocytes, erythrocytes, and thrombocytes” (p. 16, OA of 10/30/07). The Examiner clarified in the Interview Summary that the Examiner understands that the collagen mentioned in Hahn is natural in origin, not all collagen. In addition, Applicants believe that agreement was reached in the Interview that ethanol is not a buffer, where the conventional understanding of a buffer is a solution containing both a weak acid and its conjugate weak base, whose pH changes only slightly on addition of acid or alkali (see, for example, Hawley’s Condensed Chemical Dictionary, 15th Edition, Wiley Interscience, page 188, or any similar chemical dictionary). The Examiner contends that microfibrillar collagen would be suitable for any use for which collagen would be suitable. Applicants traverse this finding on the grounds that microfibrils are not functionally identical to nonfibrillar forms of collagen (e.g., discrete particles). The term microfibrillar has been deleted from the pending claims, rendering the point moot.

CONCLUSION

Applicants respectfully submit that the instant application is in condition for allowance. Entry of the amendments and an action passing this case to issue is therefore respectfully requested. In the event that a telephone conference would facilitate examination of this application in any way, the Examiner is invited to contact the undersigned at the number provided.

AUTHORIZATION

The Commissioner is hereby authorized to charge any fees which may be required for this amendment, or credit any overpayment to Deposit Account No. 50-3732, Order No. 13323.105003. Furthermore, in the event that an extension of time is required, the Commissioner is requested to grant a petition for that extension of time which is required to make this response timely and is hereby authorized to charge any fee for such an extension of time or credit any overpayment for an extension of time to the above-noted Deposit Account No. 50-3732 and Order No. 13323.105003.

Respectfully submitted,

KING & SPALDING, L.L.P.

Dated: February 6, 2009

By: /michael willis/
Michael A. Willis
Registration No. 53,913

Mailing Address:

KING & SPALDING, L.L.P.
1185 Avenue of the Americas
New York, New York 10036-4003
(212) 556-2115
(212) 556-2222 (Fax)